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No. 00 960

In the Supreme Court of the United States

EDWIN F. VIRGIN, SR., et al.,
Petitioners,

v.

COUNTY OF SAN LUIS OBISPO, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTION PRESENTED

Is due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States denied when state courts summarily dismiss concurrent jurisdiction federal constitutional claims against local governments under 42 U.S.C. § 1983, for takings, equal protection, and substantive and procedural due process violations, under a standard of review that "expressly requires" that the state court (a) "look only to the evidence supporting" the governmental action, (b) discard "evidence unfavorable" to the government, (c) accept only those inferences from the evidence as drawn by the government, and (d) disregard "even uncontradicted evidence"?

PARTIES TO THE PROCEEDING

Petitioners

Edwin F. Virgin, Sr., Susan S. Virgin, husband and wife, and Edwin F. Virgin, Jr. Petitioners are individuals and have no corporate affiliations.

Respondents

County of San Luis Obispo, a political subdivision of the State of California, Board of Supervisors of the County of San Luis Obispo, Subdivision Review Board of the County of San Luis Obispo.

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OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Six, is unreported (App. B, *infra.*, 2a-13a). The denial of the Petition for Review in the Supreme Court of California is unreported (App. A, *infra.*, 1a). Related litigation, which is not the subject of this Petition, is reported by the United States Court of Appeals for the Ninth Circuit in *Virgin v. County of San Luis Obispo*, 201 F.3d 1141 (9th Cir., 2000).

JURISDICTION

The State Court of Appeal filed its unpublished Opinion on June 26, 2000. The Supreme Court of California filed its denial of the Petition for Review *En Banc* on September 13, 2000.

Petitioners invoke the jurisdiction of this Court pursuant to Article III, Section 2, of the Constitution of the United States, for Petitioners' claims arising under the Constitution and Laws of the United States, 42 U.S.C. § 1983, the due process, equal protection, and takings clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States, and federal common law under *Packer v. Bird*, 137 U.S. 661, 669, 11 S.Ct. 210, 211, 34 L.Ed. 819 (1891).

The United States Court of Appeals for the Ninth Circuit, in dismissing Petitioners' claim of direct federal court jurisdiction, opined: "The appropriate remedy for the appellants is to litigate their claims through the state court system and then file a petition for certiorari for the U. S. Supreme Court to review the state court decision with regard to these federal land patents." *Virgin v. County of San Luis Obispo*, 201 F.3d 1141, at 1145 (9th Cir., 2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States, provides that:

> "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the Constitution of the United States, applicable to County Respondents through the Fourteenth Amendment, provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

42 U.S.C. § 1983 protects Petitioners from County Respondents' actions depriving Petitioners of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States.

In *Packer v. Bird* 137 U.S. 661, 669, 11 S.Ct. 210, 211, 34 L.Ed. 819 (1891), this Court wrote that the incidents or rights which attach to the ownership of property "conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee." 414 U.S., at 677-678, 94 S.Ct., at 782.

STATEMENT OF THE CASE

Petitioners brought suit in state court against the County of San Luis Obispo, the Board of Supervisors of the County of San Luis Obispo, and the Subdivision Review Board of the County of San Luis Obispo, California ("County Respondents"), based upon state law claims joined with federal claims against the County Respondents for the violation of 42 U.S.C. § 1983, for takings, equal protection, substantive and procedural due process, and unconstitutional condition violations of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The state court of appeal dismissed all of Petitioners' state law and federal law claims based upon evidentiary rules included within a standard of review applied to the conduct of the County Respondents. The state appellate court's standard:

> ". . .requires that we look only to the evidence supporting the prevailing party. (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.) We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. (*Ibid.*) Where the trier of fact has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though the different inferences may be reasonable. (*Ibid.*) The trier of fact is not required to believe even uncontradicted evidence. (*Ibid.*)" (App. B, 8a)

Applying this particularly draconian version of the substantial evidence test to the County's conduct, the state appellate court in effect ruled that when a property owner

raises federal constitutional challenges against a local government, such challenges will be resolved by looking only to the evidence which supports the local government's actions, discarding evidence unfavorable to the action of the local government as lacking sufficient verity to be accepted by the trier of fact, accepting all evidentiary inferences drawn by the local government in making its own decision, while being completely free not to consider even uncontradicted evidence supporting the claims.

ARGUMENT FOR GRANTING WRIT

ARGUMENT 1

Federal "constitutional torts" cannot be fairly adjudicated consistent with due process if the trier of fact is required to consider only factual evidence and inferences which favor the government and exclude all others.

Petitioners respectfully submit that the standard of review applied by the state appellate court denies Petitioners' due process rights to fairly litigate federal constitutional claims where state courts have concurrent jurisdiction, since it would be impossible under such a standard to ever prove the violation of federal constitutional and civil rights. Under this standard, a local government is always right since it alone deems itself the prevailing party in its own quasi-judicial proceedings and ministerial actions, and can do essentially whatever it chooses with regard to private property and other federal constitutional rights. Due process of law cannot be served under such a prejudicial standard of review in the adjudication of federal constitutional rights.

A. Takings claims are intensely factual determinations.

Since *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), this Court has consistently and candidly acknowledged that the question of what constitutes a taking under the Fifth Amendment has "proved to be a problem of considerable difficulty." *Id.* 57 L.Ed.2d at 648. This Court has acknowledged that there is no "set formula" for determining when "justice and fairness" require that economic injuries caused by public actions be compensated by the government. Indeed, this Court has recognized a consistent pattern that adjudicated takings claims depends largely upon the particular circumstances of each case, *Id.*; conducting "essentially ad hoc, factual inquiries", *Lucas v. South Carolina Coastal Council*, 505 U.S. 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); and require "complex factual assessments of the purposes and economic affects of government actions," *Yee v. City of Escondido*, 503 U.S. at 523, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

The three takings factors identified by this Court in *Penn Central* as particularly significant are dependant upon a fair and balanced factual inquiry. The factor concerning the nature of the governmental action is inherently fact driven; the economic impact upon private property rights factor is a factual inquiry. The extent to which a government's action has interfered with distinct and reasonable investment-backed expectations must also be considered a question requiring ascertaining true facts through the reasoned balancing of evidence. A fourth factor in takings analysis, whether such actions advance a legitimate governmental interest, also require factual inquiry and discretion to weigh conflicting evidence. *City of Monterey v. Del Monte Dunes* ___ U.S. ___, 119 S.Ct. 1624, 143 L.Ed.2d 882, 905 (1999).

When, as here, Petitioners challenge the imposition of conditions upon a lot line adjustment and other government action which retroactively requires that all underlying parcels be merged as a condition of allowing one family member to sell to another 160 acres of adjacent land (*see* shaded area, App. C, 14a and App. D, 15a, and the "Adjustment Line" on App. E, 16a), issues under this Court's *Nollan* and *Dolan* decisions also require factual inquiry which cannot be adjudicated under the state appellate court's standard of review. *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 815, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

When a state court exercises concurrent jurisdiction over federal takings claims, it is inconceivable that such claims can be resolved consistent with due process based solely upon a factual "prism" which excludes any light cast by evidence favorable to the property owner.

B. Section 1983 actions are intensely factual determinations.

This Court's decision in *City of Monterey v. Del Monte Dunes*, ___ U.S. ___, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999), recognized the fact-intensive nature of adjudicating a variety of "constitutional torts" including claims under section 1983.

This Court's decision in *City of Monterey v. Del Monte Dunes* recognized that in section 1983 actions and other "constitutional torts," the trier of fact, whether judge or jury, is presented with conflicting evidence to be decided according to its preponderance. Implicit in the rationale of the *Del Monte Dunes* decision is an opportunity to present and have

weighed evidence which is contrary to that of the government.

One can hardly imagine a tort system where the adjudication is limited to the inferences and evidence chosen by the tort defendant. These important constitutional guarantees should not be dismissed under a standard of review that excludes the consideration of any evidence or inferences which support the property owner, even if uncontradicted. When such federal claims are adjudicated by state courts exercising concurrent jurisdiction, due process must require something more than merely weighing the evidence and inferences chosen by the governmental agency while disregarding the favorable and unrebutted evidence supporting the property owner.

C. Equal protection determinations are intensely factual determinations.

This Court's *per curiam* opinion in *Village of Willowbrook v. Olech*, ___ U.S. ___, 120 S.Ct. 1073, ___ L.Ed.2d ___ (2000), acknowledged that plaintiffs can allege an equal protection violation by asserting that state action was motivated solely by a spiteful effort unrelated to any legitimate state objective. This Court acknowledged that where a plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment, a claim for the violation of equal protection under section 1983 is adequately stated.

The goal of the equal protection clause of the Fourteenth Amendment, as explained in *Willowbrook*, is to secure to every person within the state's jurisdiction against intentional and arbitrary discrimination, "whether occasioned

by express terms of a statute or by improper execution through duly constituted agents." *Id.* at 1075.

Under this state appellant court standard, there could never be a successful proof of such allegations. The correct adjudication of section 1983 equal protection claims is frustrated when state courts apply a standard of review that allows them only to consider evidence and inferences favorable to the government, while disregarding all other evidence, even if undisputed, which supports the equal protection claim.

ARGUMENT 2

The unconstitutional standard of review utilized by the state court of appeal was prejudicial to Petitioners' claims and denied due process of law.

The state court of appeal's exclusive use of a constitutionally defective standard of review infects the court's entire decision, since the only facts set forth in the opinion are those facts favorable to County Respondents which have been screened by the express evidentiary requirements of the standard of review.

Petitioners recognize that this Court cannot be mired in the voluminous factual record below with regard to Petitioners' claims. Nonetheless, it may be helpful to give some examples of the type of evidence, much of it undisputed, that the court of appeal did not consider because of its standard of review.

Prior to purchasing the property, Petitioners determined under County policies in effect in 1977 that they

were buying a number of underlying parcels, and that these parcels were further divided by two county road segments; that a new Williamson Act Contract could be entered into less than the minimum acreage, that the issuance of the 1977 certificates of compliance would not affect any underlying parcels. These facts were confirmed in writing by Edwin, Sr. and Petitioners' realtor to the County. This gave rise to a legitimate investment-backed expectation that Petitioners were acquiring multiple legal parcels which had not been merged.[1]

Instead of attempting to "create" new legal parcels, Petitioners merely sought to adjust the lines between existing parcels, to which Petitioners always were entitled.

In processing the 1977 certificates of compliance, the issue of the 1973 lot line adjustment merging all underlying parcels was considered by the County, and rejected, and based upon the advice of the County District Attorney, the County honored the request for certificates of compliance.[2] In 1977 there was a County policy recognizing County roads as dividing legal parcels and creating separate legal parcels on each side of the road based upon the advice of the County's District Attorney.[3]

The unrebutted appraisal evidence indicates that the fair market value of Petitioners' property has been

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[1] Clerk's Transcript (hereinafter C.T.), C.T. 1611, 1668, 1742, 1706, 1690, 1645, M.F. #24; Virgin, Sr. Dec., ¶¶ 2-7, 8, Exhs. "A"-"D;" Susan Virgin Dec., 2-8, Exhs. "A"-"D;" Virgin, Jr. Dec., ¶¶ 2-5, Exhs. "A"-"D;" White Dec., ¶¶ 2-8, Exhs. "A"-"E;" Rogoway Dec., ¶¶ 7-12.

[2] C.T. 1632, M.F. #112; Kelly Depo., 23:8-22.

[3] C.T. 1623, M.F. #113; ; Kelly Depo., 26:13-24, 27:2-13.

substantially reduced by the County's findings that it contained only one or two parcels.[4] The County's actions on the lot line adjustment application have impaired the marketability of Petitioners' property, their ability to sell the property and even obtain title insurance.[5]

The standard of review used by the state appellate court resulted in not even considering the unrebutted testimony of the predecessors-in-interest and the surveyor handling a prior lot line adjustment that there was never a voluntary intent to merge underlying parcels, nor was that the County practice at the time.

Undisputed evidence leads to the conclusion that the Petitioners were singled out for discriminatory treatment. The persons designated as most knowledgeable by the County testified extensively about how other similarly situated properties that involved Williamson Act, federal land patents, portions of patents, smaller than minimum parcel size, and previously issued certificates of compliance, were treated in a manner differently than how Petitioners were treated on the same routine issues,[6] and that the County *never* retroactively applies state map act or county ordinance amendments to previously recorded maps for other property owners.

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[4] C.T. 1612, 1632, 1669, M.F. #28; Schenberger Dec., ¶¶ 3-7; Virgin Sr. Dec., ¶ 17; Susan Virgin Dec., ¶ 17.

[5] C.T. 1612, 1773, M.F. 29; Virgin, Jr. Dec., ¶¶ 19, 20, 21, 22, 23, 24, 25; Irot Dec., Exh. "A".

[6] C.T. 1537-1553; M.F. ##25, 67, 84, 94, 95, 96, 97, 98, 99, 101, 104, 115, 116, 117, 119, 120, 121, 122, 123, 124, 125, 126, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 150, 151, 152, 153, 154, 155, 156.

The state appellate court's standard of review also causes it to disregard all evidence involving whether County Respondents' actions advanced any legitimate public purpose, including ignoring a determination by the County Agricultural Commissioner that the realignment of lot lines would meet the minimum qualifying acreage for the agricultural preserve program,[7] and would not result in significant impacts to agriculture.[8] Such lot line adjustments of existing legal parcels provides benefits such as financing and estate planning for agriculturalists.[9] Indeed, after on-site inspections, the County's Agricultural Commissioner noted at least ten beneficial impacts from Petitioners' lot line adjustment proposal. No legitimate state interest was advanced by treating the Petitioners differently.[10] The County's environmental review found no adverse impacts from the proposed lot lines.

The refusal to consider any opposing evidence leads the state appellate court to blame the loss of Petitioners' property rights on their own deed conveyances, contrary to the express provisions of California Civil Code § 1093, that the consolidation of separate legal descriptions into one or more deeds "does not operate in any manner to alter or affect the separate and distinct nature of the real property so described in the subsequent single instrument of conveyance. . . ." The only exception under the state statute is when there is an intent expressed in the deed to merge underlying parcels. However,

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[7] C.T. 1615, M.F. #53; Cty. Exh. Pkg., Exh. "A," p. 591.

[8] C.T. 1616, M.F. #55; Cty. Exh. Pkg., Exh. "A," p. 617.

[9] C.T. 1616, M.F. #56; Cty. Exh. Pkg., Exh. "A," p. 617 (Ag Commissioner memo).

[10] C.T. 116-117, Cty. Exh. Pkg., Exh. "A", p. 619-621.

the Court's standard of review precluded the consideration of any such unrebutted evidence that Petitioners never intended to, nor was there any controlling provision of state law, which operated to merge their underlying parcels.

CONCLUSION

There is a clear need for this Court to set certain minimum constitutional standards according to which federal constitutional cases can be fairly decided by state courts. The recognition of minimum due process standards would discourage forum shopping to a court with the most favorable standard of review and evidentiary requirements. Most importantly, however, it would correct the obvious injustice which such a standard imposes upon property owners who seek in good faith to litigate their constitutional complaints against local governments.

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APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

[Filed September 13, 2000]

S090515

EDWIN F. VIRGIN SR., *et al.*,
Plaintiff and Appellant,

v.

COUNTY OF SAN LUIB OBISPO,
Defendant and Respondent.

Court of Appeal, Second Appellate District,
Division Six - No. B125211

En Banc

Petition for review DENIED.

/s/_____
Chief Justice

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION SIX

[Filed June 26, 2000]

2d Civil No. B125211
(Super. Ct. No. CV79017)
(San Luis Obispo County)

EDWIN F. VIRGIN, SR., *et al.*,
Plaintiffs and Appellants,

v.

COUNTY OF SAN LUIS OBISPO, et al.,
Defendants and Appellants.

Adjoining property owners jointly applied to the county for a lot line adjustment. The adjustment would divide their land into eight legal parcels. They claimed that their property consisted of 13 or 14 legal parcels created by federal patents. The county denied the application on the ground that the applicants' property is comprised of only two legal parcels.

The applicants filed a petition for writ of mandate and complaint for damages. The trial court found there were only four legal parcels and ordered the county to consider a lot line adjustment for four parcels. The court thereafter granted summary judgment in favor of the county on the causes of action for damages. Both the property owners and the county appeal. The property owners contend the trial court erred in limiting them to only four parcels. The county contends the trial court erred in ordering that the county consider an application for more than two parcels. We agree with the county.

FACTS

Edwin F. Virgin, Sr. ("Edwin, Sr.") and his wife, Susan S. Virgin, own approximately 720 acres in San Luis Obispo County ("the county"). Their son, Edwin F. Virgin, Jr. ("Edwin, Jr.") owns an adjoining parcel of approximately 510 acres. Both parcels are undeveloped agricultural land.

The parcels were once part of a larger ranch granted to the Virgins' predecessor-in-interest. The grant was made by a number of federal land patents in the 1800's. The ranch remained as a single holding until the 1970's.

In 1972, the then owners of the ranch, Edwin and Catharina Shroeder, signed a Williamson Act contract pursuant to the California Land Conservation Act of 1965 (Gov. Code, § 51200 et seq.)[1] Under the contract the Shroeders agreed to preserve the land for agricultural use in

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[1] All Statutory references are to the Government Code unless otherwise stated.

exchange for a reduction in property taxes.

The contract provided, in part: "Any act by Owner which results in creation of a parcel or parcels of land, within the above-described premises, smaller than the minimum lot size prescribed by the zoning then on said premises shall constitute a violation of this contract . . . . " The zoning at the time the contract was signed provided for a 640-acre minimum parcel size.

In 1973, the Shroeders applied to the county for a lot line adjustment. In accordance with the county's procedure for a lot line adjustment, the Shroeders recorded a parcel map. The map divided the ranch into two parcels labeled A and B.

The Virgins' properties consist of all of parcel B. The Virgins contend that parcel B is composed of "at least" 13 lots created by federal patents.[2] Of the 13 patents, 6 lie in part outside the boundary of the Virgins' parcels.

Robert and Lynn Strahan are the Virgins' immediate grantors. Prior to granting parcel B to the Virgins, the Strahans obtained two certificates of compliance, making it possible to convey all of parcel B as two separate lots. The lots were divided by an existing county road that cut through parcel B diagonally. The certificates were issued under a then existing county policy that a county road acts as a boundary between parcels.

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[2] In the proceedings below the Virgins sometimes contended there are 13 and sometimes contended there are 14 lots created by federal patents underlying parcel B.

The Strahans conveyed the parcel lying north and west of the county road to Edwin, Jr. They conveyed the parcel lying south and east of the county road to Edwin, Sr. and his wife, Susan.

The county road, and thus the boundary between the Virgins' parcels, cut through a number of the original federal patents. After the conveyance to the Virgins, only four of the original patents underlying the Virgins' parcels remained intact; that is, not intersected by a boundary line. One of these was under Edwin, Jr.'s parcel and three were under his parents' parcel.

After the conveyances the Virgins entered into new Williamson Act contracts. These contracts, like the previous one covering the entire ranch, prohibit "creation of a parcel or parcels of land . . . smaller than the minimum lot size prescribed by the zoning."

In 1993, the Virgins jointly applied to the county for a lot line adjustment. The proposed adjustment would create eight parcels; five on Edwin, Jr.'s parcel and three on his parents' parcel. The smallest parcel would be 100 acres and the largest parcel would be 353 acres. The zoning requires a 640-acre minimum parcel size.

The county's subdivision review board denied the application. The Virgins appealed to the board of supervisors. The board of supervisors also denied the application on recommendation of its planning staff. The board took the position that the original parcels created by federal patents were eliminated in 1972 when the parcel map was filed showing the Virgins' land to be a single parcel B.

That parcel was later divided in two by conveyances pursuant to certificates of compliance. Because there are only two parcels, the land cannot be divided into eight parcels by a lot line adjustment. In addition, any such adjustment would violate the Williamson Act contracts and current zoning.

The Virgins filed a petition for writ of mandate and complaint for damages. The petition alleged that the county abused its discretion and acted in an arbitrary and capricious manner in denying the Virgins' application. More specifically, the Virgins alleged that the county erred in finding that the Virgins' property consisted of only two legal parcels instead of fourteen, and in finding that the adjustment would violate the Williamson Act contracts and county ordinances. The Virgins also sought damages for violation of their civil rights under color of law. (42 U.S.C.A., § 1983.) The Virgins amended their complaint to add other causes of action for damages including inverse condemnation and slander of title.

The trial court concluded that prior to 1972, the Virgins' land contained eight parcels; the 1972 lot line adjustment did not extinguish the original parcels; and that there are only four of the original parcels that were not divided by conveyances, one on Edwin, Jr.'s parcel and three on his parents' parcel. The four patents cover only 390 acres out of a total of 1240 acres owned by the Virgins. The conclusion that there are four legal parcels created by the surviving patents left 850 acres not included in any legal parcel. The court also concluded that the Williamson Act contracts did not prohibit the lot line adjustment, recognizing there are other ways to enforce those contracts. The trial court remanded the matter to the board of supervisors for

reconsideration of the Virgins' application in light of its conclusions. The board approved the Virgins' amended application for four parcels. The trial court accepted the county's writ return, finding that the county had complied with the writ of mandate.

The trial court granted the county's motion for summary judgment on the Virgins' causes of action for damages. The Virgins appeal and the county cross-appeals.

DISCUSSION

I

Section 66412, subdivision (d), provides in part: "This division [on subdivisions] shall be inapplicable to: [¶]. . .[¶] (d) A lot line adjustment between two or more existing adjacent parcels, where the land taken from one parcel is added to an adjacent parcel, and where a greater number of parcels than originally existed is not thereby created, provided the lot line adjustment is approved by the local agency, or advisory agency. A local agency or advisory agency shall limit its review and approval to a determination of whether or not the parcels resulting from the lot line adjustment will conform to local zoning and building ordinances . . . . "

San Luis Obispo County Real Property Ordinance, section 21.02.030 provides: "A lot line adjustment shall not be approved or conditionally approved unless the new parcels resulting from the lot line adjustment will conform with the county's zoning and building ordinances. The criteria to be considered includes, but is not limited to, standards relating to parcel design and minimum lot area. These criteria may be

considered satisfied if the resulting parcels maintain a position with respect to said criteria which is equal to or better than such position prior to approval or conditional approval of the lot line adjustment."

Our task on appeal is to determine whether the county's decision is supported by the findings and whether the findings made by the county are supported by substantial evidence. (Code Civ. Proc., § 1094.5, subds. (b)-(c).)

The substantial evidence rule requires that we look only to the evidence supporting the prevailing party. *(Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.) We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. *(Ibid.)* Where the trier of fact has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable. *(Ibid.)* The trier of fact is not required to believe even uncontradicted evidence. *(Ibid.)*

II

The county relies on section 66499.20 1/2. That section states in part, "The filing of the . . . parcel map shall constitute legal merging of the separate parcels into one parcel and the resubdivision of such parcel . . . ." The county points to the 1973 parcel map showing the Virgins' parcels as a single parcel B.

The Virgins argue that section 66499.20 1/2 does not apply. They point out that the 1973 parcel map was recorded prior to the enactment of section 66499.20 1/2 in 1977. The

county responds that the section was applied to a parcel map recorded prior to its enactment in *Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977. We cannot place much reliance on *Gomes,* however, because the application of the statute to parcel maps recorded prior to its enactment was not an issue discussed in the case. An opinion is not authority for issues not considered. *(Contra Costa Water Dist. v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 660.) Nevertheless, there is nothing on the face of section 66499.20 1/2 that limits its application to parcel maps recorded after its enactment.

Even assuming section 66499.20 1/2 does not apply here the result is still the same. The parcel map recorded in 1973 shows two large parcels, A and B. It does not show the location of nor make any reference to the existence of the federal patents that the Virgins claim have remained as separate parcels. It is impossible to tell by looking at the map which of the patent lines were being adjusted and which were intended to remain.

Parcel B was conveyed as a whole without regard to the federal patents. Parcel B was then divided in half and each half was conveyed to different parties. The dividing line between the parcels was not made with reference to any of the underlying patents. Instead, the dividing line was a county road that ran through a number of the parcels described by the patents.

It is inconsistent for a property owner to make conveyances that traverse lots created by federal patents and still claim that the lots created by the patents remain. When the owners of the ranch finished making conveyances only

four of the underlying lots created by federal patents remained undisturbed.

The trial court's ruling is based on the theory that the four undisturbed patents remain as four separate legal parcels. But, as the Virgins themselves point out, the area covered by the four patents is only 390 acres out of a total of 1240 acres owned by them. Thus the ruling left the Virgins with 850 acres that had no legal status and could not be sold, leased or financed.

The only reasonable conclusion is that the conveyances made by the Virgins' predecessors-in-interest left them with only two legally recognized parcels that cover the entire of their property. Those are the parcels for which the county issued certificates of compliance.

The Virgins' case is based on the apparent belief that parcels created by federal patents are indestructible and can be divided by conveyance with each portion becoming a legally recognized parcel.

The Virgins cite section 66412.6 for the proposition that the parcels created by the federal patents are conclusively presumed to be lawfully created.[3] But the county is not contesting the lawfulness of the parcels' creation. That is

---

[3] Section 66412.6 provides in part: "(a) For purposes of this division or of a local ordinance enacted pursuant thereto, any parcel created prior to March 4, 1972, shall be conclusively presumed to have been lawfully created if the parcel resulted from a division of land in which fewer than five parcels ere created and if at the time of the creation of the parcel, there was no local ordinance in effect which regulated divisions of land creating fewer than five parcels.

because the conveyances are inconsistent with the patents' continuing existence as legal parcels.

The Virgins' citation to *Packer v. Bird* (1891) 137 U.S. 661,669 [11 S.Ct. 210, 211, 34 L.Ed 819, 821] is not helpful to them. There the court stated, "whatever incidents or rights attach to the ownership of property conveyed by the [federal] government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property, by the grantee." The Virgins claim that the county is impairing their use and enjoyment of the property.

But the court decided *Packer* in the context of an action for possession of lands allegedly embraced by a federal patent. The words "use and enjoyment of the property" refer simply to the general right of possession. The court was not suggesting that one who takes under a federal patent has the right to use or divide his land in a manner that is inconsistent with local law. As the court stated in *Oneida Indian Nation of N. Y. State v. County of Oneida, New York* (1974) 414 U.S. 661,676 [94 S.Ct. 772, 782, 39 L.Ecl.2d 73, 84]: "Once patent issues, the incidents of ownership are, for the most part, matters of local property law . . . . " Here the county is not contesting the Virgins' title or right to possession of any of the land conveyed by federal patent. *Packer* simply does not apply.

[¶] (b) For purposes of this division or of a local ordinance enacted pursuant thereto, any parcel created prior to March 4, 1972, shall be conclusively presumed to have been lawfully created if any subsequent purchaser acquired that parcel for valuable consideration without actual or constructive knowledge of a violation of this division or the local ordinance."

The Virgins' reliance on section 66451.10, subdivision (a), is also misplaced. That section provides that lawfully created parcels "shall not be deemed merged by virtue of the fact that the contiguous parcels or units are held by the same owner . . . ." But here the parcels are not deemed merged by virtue of their being held by the same owner. To the extent there is any merger it is because the owners made conveyances that are inconsistent with the continuing legal existence of any parcels but the two approved by the certificates of compliance.

We conclude the county was correct in its position that the Virgins' property consists of only two legal parcels. Because the Virgins' causes of action for damages were premised on the theory that they had the right to a lot line adjustment showing eight parcels, the trial court's grant of summary judgment in favor of the county was necessarily correct. It need not discuss the specifics of each cause of action.

The judgment granting the writ of mandate is reversed. In all other respects the judgment is affirmed. Costs on appeal are awarded to the county.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Kenneth Andreen, Judge*

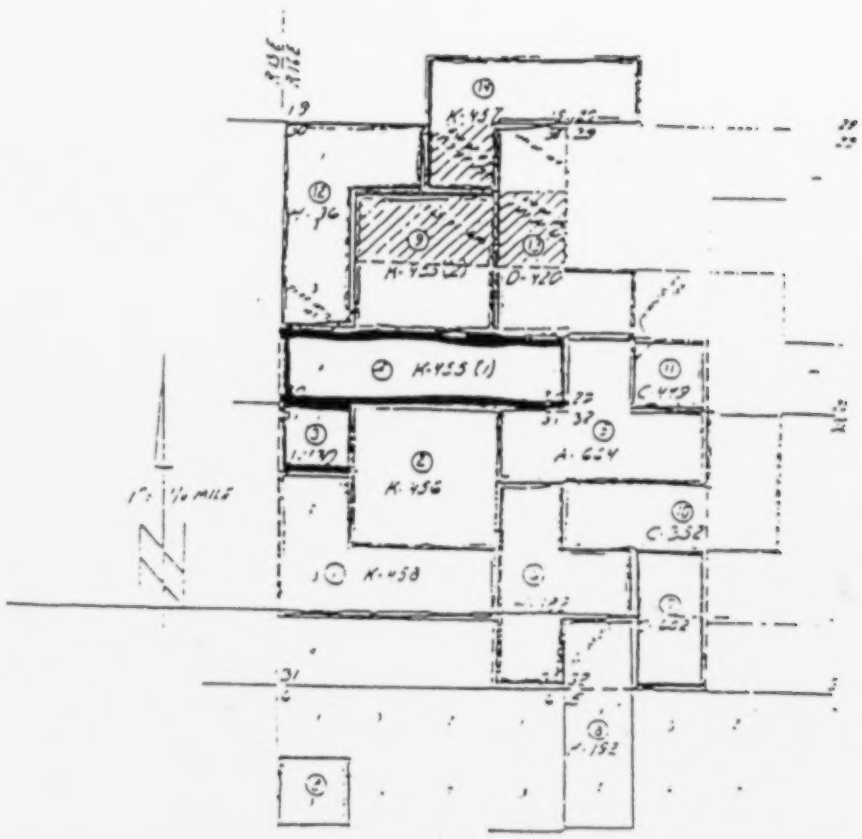
Superior Court County of San Luis Obispo

---

* Retired Associate Justice, Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX C

[Fold out]



1	K-458	SAGE	132.70	
2	K-456	YELLOW	140.00	
3	J-138	BLACK	38.00	
4	K-455(1)	GREEN	159.12	
5	A-624	LT. BLUE	140.00	
6	K-457	RED	140.00	
7	C-432	BROWN	28.00	
8	K-152	ORANGE	211.00	
9	K-454(1)	VIOLET	140.00	
10	C-352	AQUA GRN	140.00	
11	C-443	GRN SAGE	42.00	
12	K-36	PINK	158.92	
13	D-420	PEACH	140.00	
14	K-457	GRAY	140.00	

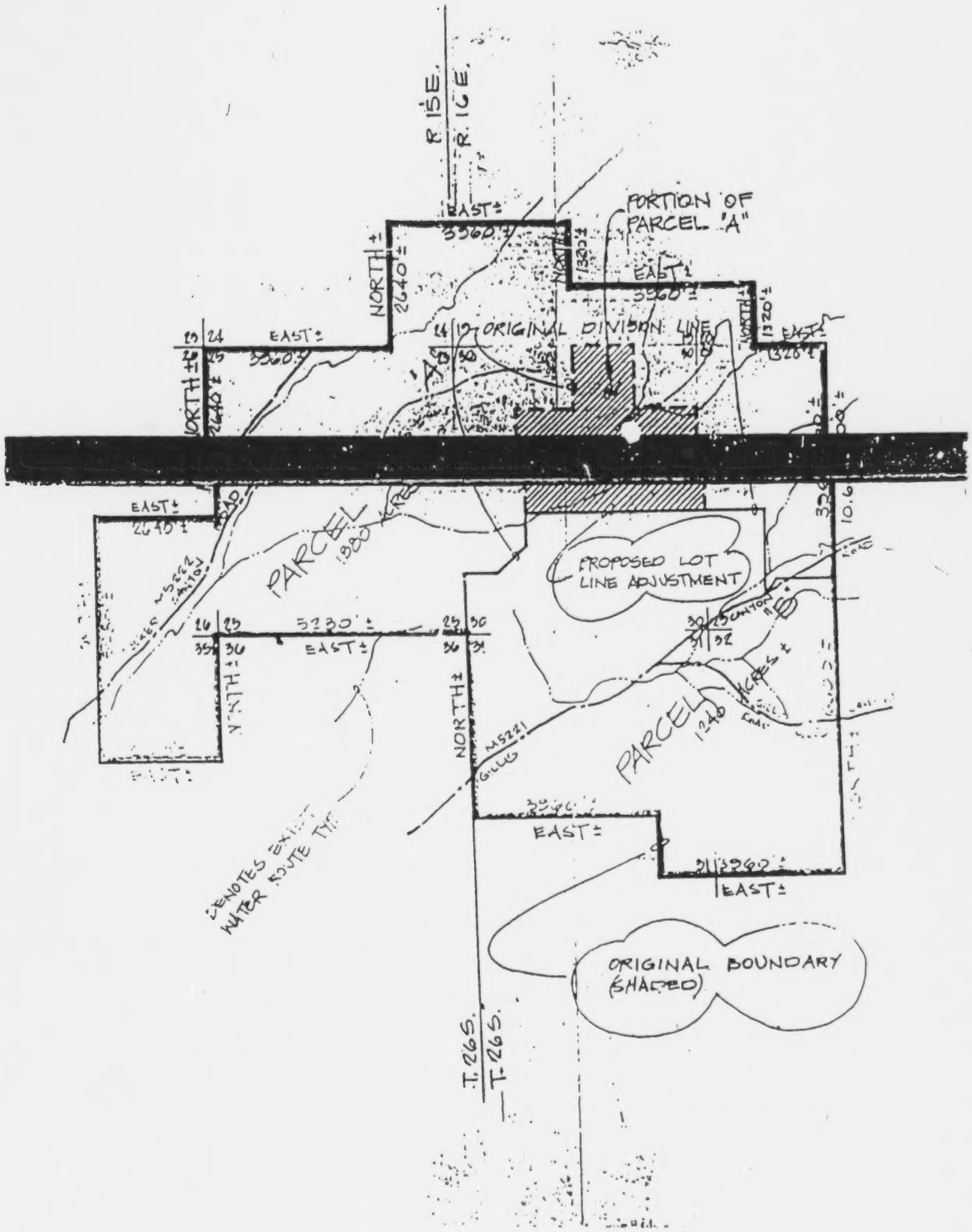
EXHIBIT A

PAGE 1 OF 1

APPENDIX D

[Fold out]

BEST AVAILABLE COPY



APPENDIX E

[Fold out]

PROJECT
COAL 93-102
VIRGIN/STEWART

EXHIBIT
PREVIOUS MAP
COAL 72-337

12½

PARCEL MAP

CO-AL-72-337

BEING A DIVISION OF SECTION 25 AND PORTIONS OF SECTIONS 24, 26, AND 35, T.10S., R.15E., M.D.M., AND ALSO BEING A DIVISION OF SECTION 30 AND PORTIONS OF SECTIONS 19, 20, 29, 31 AND 32, T.10S., R.16E., M.D.M., COUNTY OF SAN LUIS OBISPO, STATE OF CALIFORNIA

NOTE: THIS IS ALSO A LOT LINE ADJUSTMENT BETWEEN PROPERTY SHOWN HEREON.

SURVEYOR'S CERTIFICATE:

THIS MAP WAS PREPARED BY ME OR UNDER MY DIRECTION AND WAS COMPILED FROM RECORD DATA ~~SHOWN OR FIELD SURVEY~~ IN CONFORMANCE WITH THE REQUIREMENTS OF THE SUBDIVISION MAP ACT ON NOV. 16, 1972. I HEREBY CERTIFY THAT IT CONFORMS TO THE APPROVED TENTATIVE MAP AND CONDITIONS OF APPROVAL THEREOF, THAT ALL PROVISIONS OF APPLICABLE STATE LAW AND LOCAL ORDINANCES HAVE BEEN COMPLIED WITH, AT THE REQUEST OF ROBERT STRAHAN.

DANIEL J. STEWART R.C.E. 14984

COUNTY SURVEYOR'S CERTIFICATE:

THIS MAP HAS BEEN EXAMINED FOR CONFORMANCE WITH THE REQUIREMENTS OF SECTION 11575 OF THE SUBDIVISION MAP ACT THIS 12TH DAY OF Dec., 1973.

COUNTY SURVEYOR R.C.E. 10197

COUNTY RECORDER'S CERTIFICATE:

FILED THIS 14TH DAY OF December, 1973, AT 2:38 P.M., IN BOOK 13 OF PARCEL MAPS AT PAGE 28 AT THE REQUEST OF DANIEL J. STEWART.

FEE: Free DOCUMENT NO.: 10110

WILLIAM E ZIMARIK
COUNTY RECORDER
BY: [illegible] Deputy

COUNTY PLANNING COMMISSION:

THIS PARCEL MAP, WHEREON THIS CERTIFICATE IS ENDORSED, IS HEREBY APPROVED BY THE PLANNING COMMISSION OF THE COUNTY OF SAN LUIS OBISPO, STATE OF CALIFORNIA IN ACCORDANCE WITH THE PROVISIONS OF SECTION 11535 (d) OF THE SUBDIVISION MAP ACT, BUSINESS AND PROFESSIONS CODE OF THE STATE OF CALIFORNIA, WITNESS MY HAND THIS 14th DAY OF December, 1973.

CHAIRMAN — SECRETARY

DANIEL J. STEWART & ASSOC.

ADDRESS: 331 12TH. STREET
P.O. BOX 2038
PASO ROBLES, CALIF.

#72206

T.10S R.15E.

T.10S R.16E.

T.26. R.15E.

T.27S. R.16E.

"A"

"B"

PARCEL
(THIS PARCEL DOES NOT CLOSE MATHEMATICALLY)
1140/OR/190, 807/OR/340, 1403/OR/630,
1140/OR/642, 1705/OR/736

PARCEL
1555 AC.
(THIS PARCEL DOES NOT CLOSE MATHEMATICALLY)

ORIGINAL DIVISION LINE (DASHED)

ADJUSTMENT LINE

APPROX. LOCATION ONLY OF EXIST. SHALE TYP.

APPROX. LOCATION ONLY

VICINITY MAP
NO SCALE

SITE

HWY 46

SAN LUIS OBISPO

FD. CO MON. NO. 16 FOR VERTICAL CONTROL

NOTE: All Dimensions shown hereon are based on GEO Values of ground solution combined therefrom, unless noted otherwise.

SAN LUIS OBISPO COUNTY DEPARTMENT OF PLANNING & BUILDING

Supreme Court, U.S.
FILED
JAN 10 2001
OFFICE OF THE CLERK

No. 00-960

IN THE

Supreme Court of the United States

EDWIN F. VIRGIN, SR., *et al.*,

Petitioners,

v.

COUNTY OF SAN LUIS OBISPO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a state court case involving the California Subdivision Map Act and the California Williamson Act, following a final federal court judgment which determined that there are no federal statutory or common law issues, can Petitioners state a cognizable claim pursuant to the Fifth and Fourteenth Amendments to the United States Constitution for equal protection and substantive due process violations, based upon the California standard for appellate review of factual determinations by a trial court?

LIST OF PARTIES

Petitioners

Edwin F. Virgin, Sr., Susan F. Virgin, husband and wife, and Edwin F. Virgin, Jr.

Respondents

County of San Luis Obispo, a political subdivision of the State of California, Board of Supervisors of the County of San Luis Obispo, Subdivision Review Board of County of San Luis Obispo.

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Other Authority:

9 Witkin Cal. Proc. 4th Ed. "Appeal" § 316, *et seq.* 9

OPINIONS BELOW

This Petition for Writ of Certiorari arises from a denial of a Petition for Review by the Supreme Court of California of a decision by the Court of Appeal of the State of California, Second Appellate District, Division Six, involving the subject matter of Petitioner's claim.

Petitioners, as adjoining property owners, jointly applied to the County of San Luis Obispo for a lot line adjustment pursuant to state and local procedures. The adjustment sought to divide Petitioners' land into eight separate parcels. Petitioners claimed that their property consisted of thirteen or fourteen legal parcels originally created by virtue of federal patents granted in the 1800's. The County denied Petitioners' application because the property involved is comprised of only two legal parcels. The State Court of Appeal affirmed the trial court's and the County's decision. The California Supreme Court subsequently denied review of the matter.

The United States Court of Appeals for the Ninth Circuit also previously considered Petitioners' claims in *Virgin, et al. v. County of San Luis Obispo, et al.*, 201 F.3d 1141 (9th Cir. 2000)[1], in which the Court of Appeals affirmed the District Court's dismissal of the case because of lack of subject matter jurisdiction. Through this Petition for Writ of Certiorari, Petitioners essentially attempt to continue to relitigate the precise issue already determined by the Ninth Circuit Court of Appeals: whether the mere fact that real property which traces its title to a federal land patent granted in the 1880's is exempt from state and local laws pertaining

1. Appendix, *infra*.

to the ownership, subdivision and use of real property. The Ninth Circuit concluded as follows:

> There is no analogous federal statute here that preempts either the county ordinance or state regulations. Furthermore, all the Supreme Court and Ninth Circuit cases on point hold that acts of Congress granting federal land patents are not bases for federal question jurisdiction. Nor is there any Supremacy Clause decision based solely on a federal land patent.
>
> Since the *Oneida, Packer v. Bird* and Supremacy Clause arguments are totally unpersuasive, we will not address the appellants' substantive claims. As the Ninth Circuit said in the federal land patent case most on point, 'whatever the extent of [the Virgins'] possessory rights to that property, [they] must vindicate those rights in the state courts.' *Landi*, 740 F.2d at 713-14.[2]

---

2. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 676-77 (1974), 94 S. Ct. 772, 39 L. Ed. 2d 73, ("once patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such situations it is normally insufficient for 'arising under' jurisdiction merely to allege that ownership or possession is claimed under a United States patent."); *Packer v. Bird*, 137 U.S. 661 (1891), 11 S. Ct. 210, 34 L. Ed. 819 (water rights case involving shoreline disputes); and *Landi v. Phelps*, 740 S.2d 710, 713-714 (9th Cir. 1984) (holding that "the United States has no continuing interest in the property" acquired through federal land patents).

INTRODUCTION

In 1977, Petitioners acquired two parcels of land in San Luis Obispo County, California, consisting of approximately 1230 acres of undeveloped agricultural land. The parcels were once part of a larger ranch granted to Petitioners' predecessors-in-interest, which was originally the result of a number of federal land patents from the 1880's. The ranch remained as a single undeveloped agricultural holding until the 1970's.

The property acquired by Petitioners in 1977 was subject to a Final Parcel Map and Certificates of Compliance, previously approved, filed, and recorded pursuant to the California Subdivision Map Act[3], which reflected the property for all official purposes as two separate legal parcels. In addition, the property was subject to Williamson Act contracts pursuant to the California Land Conservation Act of 1965[4] under which Petitioners agreed to preserve the land intact for agricultural use in exchange for a reduction in property taxes.

The contracts specifically provided, in part:

> Any act by Owner which results in creation of a parcel or parcels of land, within the above-described premises, smaller than the minimum lot size prescribed by the zoning then on said

---

3. Subdivision Map Act, Government Code § 66410, *et seq.* (formerly California Business and Professions Code § 11525, *et seq.*).

4. Government Code § 51200, *et seq.*

> premises shall constitute a violation of this contract . . .

The zoning applicable to the subject property at the time the Williamson Act contracts were signed, and throughout their existence, provides for a 640 acre minimum parcel size.

In 1993, Petitioners jointly applied to the County of San Luis Obispo for a lot line adjustment seeking to create eight parcels. The smallest parcel was intended to be 100 acres and the largest parcel was intended to be 353 acres, all of which were substantially smaller than the minimum parcel size required for the creation of new parcels by the County's zoning ordinances. The County's Subdivision Review Board denied the lot line adjustment application because Petitioners did not own eight parcels to adjust and because the creation of new parcels would violate the California Subdivision Map Act, the Williamson Act contracts, and current zoning. Petitioners appealed the decision to the County Board of Supervisors, which denied the appeal for the same reasons. The Board of Supervisors found that because there are only two parcels under California law, the land cannot legally be divided into eight parcels by a lot line adjustment. Moreover, any such adjustment would violate the Williamson Act contracts and current zoning.

Petitioners filed a petition for writ of mandate and complaint for damages in the San Luis Obispo County Superior Court challenging the decision of the Board of Supervisors. The petition alleged that the County abused its discretion and acted in an arbitrary and capricious manner in denying the lot line adjustment application. Petitioners specifically alleged that the County erred in finding that the subject property consisted of only two legal parcels instead

of fourteen, and in finding that the adjustment would violate the Williamson Act contracts and County ordinances. Petitioners further sought damages for violation of their civil rights under color of law pursuant to 42 U.S.C. § 1983. Petitioners amended their complaint to add other causes of action for damages, including inverse condemnation and slander of title.

After a trial on the merits of the writ of mandate cause of action, the trial court concluded that Petitioners' property consisted of four legal parcels and remanded the matter to the Board of Supervisors for reconsideration of Petitioners' application in light of its conclusions. The Board of Supervisors subsequently approved Petitioners' amended application for four parcels and the trial court accepted the County's writ return, finding that the County had complied with the writ of mandate. In a subsequent proceeding, the trial court granted the County's motion for summary judgment on Petitioners' causes of action for damages. Petitioners appealed the decisions to the State Court of Appeal and the County cross-appealed on the issue of whether Petitioners' property consisted of four, rather than two, legal parcels.

The State Court of Appeal concluded that the County was correct in its position that Petitioners' property consists of only two legal parcels. Moreover, the Court of Appeal concluded that because Petitioners' causes of action for damages were premised on a theory that they had a right to a lot line adjustment showing eight parcels, the trial court's grant of the summary judgment in favor of the County was necessarily correct. Consequently, the Court of Appeal reversed the writ of mandate and entered judgment in favor

of the County. Petitioners' request for review by the Supreme Court was subsequently summarily denied.

Concurrently with their prosecution of the state court actions, Petitioners also sought to litigate their dispute with the County in the United States District Court for the Central District of California. The District Court dismissed Petitioners' action with prejudice for lack of subject matter jurisdiction. Petitioners appealed that decision to the Ninth Circuit Court of Appeals, which affirmed the District Court's dismissal because of lack of subject matter jurisdiction. *Virgin, et al. v. County of San Luis Obispo, et al.*, 201 F.3d 1141, *supra*. Although the Ninth Circuit conclusively rejected Petitioners' claims for federal relief, Petitioners nevertheless characterize the Ninth Circuit's reported decision as an invitation for review by the United States Supreme Court pursuant to this Petition for a Certiorari.

Petitioners apparently now argue that the decisions of the California state courts were based upon evidentiary rules included in a "draconian" standard of review which itself somehow violates the Fifth and Fourteenth Amendments to the Constitution of the United States. For the reasons argued herein, Petitioners cannot state a cognizable basis for a writ of certiorari by the United States Supreme Court.

REASONS FOR DENYING THE WRIT

There are no compelling reasons justifying the granting of a writ of certiorari. Respondents recognize that the considerations governing review of petitions for writ of certiorari pursuant to the Rules of the Supreme Court are not necessarily controlling, nor do they fully measure the Supreme Court's discretion. Nevertheless, the rules indicate

the reasons the Court considers in petitions for writ of certiorari, none of which are present in this case.

I. Petitioners Mischaracterize The Standard Of Review Utilized By The State Court Of Appeal

In an effort to "side step" the ultimate fact that this case raises no justiciable federal issues, Petitioners assert that the State Court of Appeal dismissed all of their state law and federal law claims based upon evidentiary rules included within a standard of review applied preferentially to the conduct of the County Respondents, thereby violating their Fifth and Fourteenth Amendment rights, privileges, and immunities. In Petitioners' words:

> Applying this particularly draconian version of the substantial evidence test to the County's conduct, the state appellate court in effect ruled that when a property owner raises federal constitutional challenges against the local government, such challenges will be resolved by looking only to the evidence which supports the local government's actions, discarding evidence unfavorable to the action of the local government as lacking sufficient verity to be accepted by the trier of fact, accepting all evidentiary inferences drawn by the local government in making its own decision, while being completely free not to consider even uncontradicted evidence supporting the claim.[5]

---

5. Petition for Writ of Certiorari, pp. 3-4.

Petitioners mischaracterize the standard of review followed by the State Court of Appeal required by California Code of Civil Procedure §§ 1094.5(b) and (c), which defines the judicial review of administrative decisions pursuant to administrative mandamus. The State Court of Appeal expressly recognized the statutory standard.[6] Civil Procedure §§ 1094.5(b) and (c) provide as follows:

> (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.
>
> (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

On the basis of the State Court of Appeal's citation of the evidentiary standard enunciated in *Rodney F. v. Karen M.*, 61 Cal. App. 4th 233, 241 (1998), Petitioners somehow

---

6. Petition for Writ of Certiorari, Appendix B, p. 8a.

reason that the Court of Appeal ultimately adopted a standard which obligates it to only consider evidence supporting the governmental action.[7] However, the State Court of Appeal's decision expressly references the standard of review indicated by Code of Civil Procedure §§ 1094.5(b) and (c). The State Court of Appeal did what appellate courts do in all cases: it deferred to the trial court's determinations on factual questions. The citation to *Rodney F. v. Karen M.* simply supports this fundamental principle of jurisprudence. Moreover, *Rodney F. v. Karen M.*, did not involve any governmental action whatsoever, but rather, was a paternity suit between private parties.

Petitioners' argument reflects a fundamental misunderstanding of the basic role of appellate courts in general. It is well settled under California law, and elsewhere, that the function of an appellate court is to review errors of law and not pass on questions of fact. (*Tupman v. Haberkern*, 208 Cal. 256 (1929); 9 Witkin Cal. Proc. 4th Ed. "Appeal" § 316 p. 354, *et seq.*) The distinction between fact and law in California cases was discussed in *Board of Education v. Jack M.*, 19 Cal. 3d 691, 698 (1977) as follows:

> In theory, the determination is one of ultimate fact if it can be reached by logical reasoning from the evidence, but one of law if it can be reached only by the application of legal principles.

---

7. The very question for review presented by Petitioners describes "a standard of review that 'expressly requires' that the state court (a) 'look only to the evidence supporting' the governmental action, (b) discard 'evidence unfavorable' to the government, (c) accept only those inferences from the evidence as drawn by the government, and (d) disregard 'even uncontradicted evidence'?" Petition for Writ of Certiorari, p. i.

In this case, Petitioners cannot establish that the State Court of Appeal failed to consider the substantial evidence in the record before it. Furthermore, Petitioners have not prevailed in any court on legal issues germane to their claims. Consequently, Petitioners have not established any basis for review by this Court on a theory that their Fifth and Fourteenth Amendment rights have been violated on the basis of an evidentiary standard of review, or otherwise.

II. This Case Does Not Present Any Conflict Between Decisions Of The United States Courts of Appeals Or Any State Courts Of Last Resort

As previously discussed, the claims raised by Petitioners were addressed by the Ninth Circuit Court of Appeals in *Virgin, et al. v. County of San Luis Obispo, et al.*, 201 F.3d 1141, *supra*. Petitioners cannot establish that the decision of the Ninth Circuit was in conflict with the decision of any other United States Court of Appeals. Moreover, Petitioners cannot establish that the decision of the California Court of Appeal conflicted with any other decision by a state court of last resort. The decision was unpublished and, therefore, is not by definition any appellate authority whatsoever. A writ of certiorari should be granted only in cases necessitating the resolution of principles of importance to the public, as distinguished from parties, and in cases in which there are real conflicts of opinion and authority between courts of appeals. (*N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed. 479 (1951).)

III. This Case Does Not Present Any Federal Question

As discussed by the Ninth Circuit in *Virgin, et al. v. County of San Luis Obispo, et al.* 201 F.3d 1141, *supra*, federal land patents do not provide a basis for federal question jurisdiction. The Supreme Court in *Shulthis v. McDougal*, 225 U.S. 561, 569-70 (1912), 32 S. Ct. 704, 56 L. Ed. 1205, stated as follows:

> [a] suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws.

The rule established by *Shulthis v. McDougal* has been repeatedly reaffirmed by the Supreme Court, the Ninth Circuit, and other lower courts. (*See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 676-77 (1974), 94 S. Ct. 772, 39 L. Ed. 2d 73; *Barnett v. Kunkel*, 264 U.S. 16, 20 (1924), 44 S. Ct. 254, 68 L. Ed. 539; *Landi v. Phelps*, 740 F.2d 710, 713-714 (9th Cir. 1984); *Standage Ventures, Inc. v. Arizona*, 499 F.2d 248, 249 (9th Cir. 1974) and *Hilgeford v. Peoples Bank*, 776 F.2d 176, 178 (7th Cir. 1985) per curiam.)

IV. The California Court Of Appeal Has Not Decided Any Important Question Of Federal Law That Has Not Been, But Should Be, Settled By The Supreme Court, Nor Has The Court Of Appeal Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions Of The Supreme Court

Petitioners cannot establish that the California Court of Appeal decided an important question of federal law that needs to be settled by the Supreme Court, or conflicts with any relevant decision of the Supreme Court. As previously noted, the decision by the California Court of Appeal is unpublished and, therefore, is not even a precedent that could ever pose a conflict with relevant decisions of the Supreme Court.

In final analysis, the sole basis for Petitioners' claim in this Petition for Certiorari is an argument that somehow the State Court of Appeal followed a standard of review, which Petitioners not only mischaracterize, but which involved matters which do not raise federal questions. Moreover, even if a federal question were somehow found to exist based upon Petitioners' dubious procedural due process argument, the Supreme Court has held that it is not sufficient that a federal question, abstractly considered, might present intellectually interesting and solid problems, since the Court does not sit to satisfy scholarly interests in such issues, nor for the benefit of particular litigants. (*Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).)

CONCLUSION

Petitioners have failed to prevail on any federal issue, so they now want the Supreme Court to second-guess the lower courts based upon a mischaracterized evidentiary theory. Petitioners are essentially asking this Court to review a voluminous evidentiary record involving matters of purely state law on the pretense that this case somehow raises federal claims pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States. The Supreme Court has long recognized that it should not grant a writ of certiorari merely to review evidence or inferences. (*General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 58 S. Ct. 849, 82 L. Ed. 1273, *adhered to*, 305 U.S. 124, 59 S. Ct. 116, 83 L. Ed. 81, *reh. den.*, 305 U.S. 675, 59 S. Ct. 355, 83 L. Ed. 437 (1938).)

Respondents respectfully request that the Supreme Court deny the Petition for Writ of Certiorari for the reasons discussed above.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 13, 2000

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98-55557

D.C. No.
CV-97-08599-ABC

EDWIN F. VIRGIN, SR.; SUSAN S. VIRGIN; EDWIN F. VIRGIN, JR.,

Plaintiffs-Appellants,

v.

COUNTY OF SAN LUIS OBISPO, a political subdivision of the State of California; SUPERIOR & MUNICIPAL COURTS OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN LUIS OBISPO; BOARD OF SUPERVISORS OF THE COUNTY OF SAN LUIS OBISPO,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted
Oct. 6, 1999—Pasadena, California

Filed Jan. 13, 2000

Appendix

Before: Betty B. Fletcher, Dorothy W. Nelson, and Melvin Brunetti, Circuit Judges.

Per Curiam Opinion

* * *

OPINION

PER CURIAM:

We affirm the district court's dismissal because of a lack of subject matter jurisdiction.

Factual and Procedural Background

Edwin F. Virgin, Sr., Susan S. Virgin, and Edwin F. Virgin, Jr. own land in the County of San Luis Obispo because of federal land patents granted to their predecessors-in-interest. The Virgins appeal the district court's dismissal for lack of subject matter jurisdiction over their declaratory relief action against the county and others alleging that the county's Subdivision Review Board improperly denied their application for a parcel lot line adjustment intended to create thirteen separate legal parcels out of the Virgins' acreage. The Virgins argue that the district court erred because: (1) the general rule that a federal land patent does not confer federal question jurisdiction does not apply; (2) several Supreme Court precedents and/or the acts of Congress creating their federal patents provide exceptions to the general rule; and (3) the Supremacy Clause creates federal question jurisdiction.

Appendix

The appellants claim ownership of about 1,240 acres in San Luis Obispo County. They allegedly own seven legal parcels created by patents issued to the Virgins' predecessors-in-interest by the United States government pursuant to acts of Congress in 1820 and 1862. In addition, they claim to own six parcels acquired pursuant to other acts of Congress in 1820, 1829, 1853, and 1862. The appellants recorded these parcels in the records of the County Recorder.

In 1993, the Virgins filed an application with the county for a lot line adjustment pursuant to County Ordinance and California Government Code Section 66412(d) that reconfigured the thirteen lots into eight lots. On April 3, 1995, the county's Subdivision Review Board denied their application for a lot line adjustment and found that their property included only one parcel. The Virgins appealed the denial of the lot line application to the county's Board of Supervisors. After hearings on August 8, 1995, and October 17, 1995, the Board denied the appeal on February 6, 1996 and found that the Virgins' property included only two parcels. The Virgins then filed a petition for writ of mandamus or a writ of mandate, and a complaint for declaratory relief, an injunction, and damages in the Superior and Municipal Courts of the State of California for San Luis Obispo County. They named as defendants the county, the Subdivision Review Board, and the Board of Supervisors. On May 6, 1997, the Superior Court ordered the county to conduct a hearing to reconsider the lot line adjustment but found that the Virgins' property consisted of only four parcels. The county Board of Supervisors held a hearing and confirmed that the Virgins owned only four parcels, "which do not include the majority of Plaintiffs' ownership of the land patents."

Appendix

On November 21, 1997, the Virgins filed a complaint for declaratory and injunctive relief in federal district court. They named as defendants San Luis Obispo County, its Board of Supervisors, and the Superior and Municipal Courts of the State of California for the County of San Luis Obispo. On December 16, 1997, the district court issued an order to show cause why the action should not be dismissed for lack of subject matter jurisdiction. On February 12, 1998, after briefing by both parties and a hearing, the district court dismissed the case with prejudice for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). The Virgins timely appealed.

Standard of Review

The Ninth Circuit reviews dismissals for lack of subject matter jurisdiction de novo. *See Crist v. Leippe*, 138 F.3d 801, 803 (9th Cir.1998).

Discussion

This case is an extremely straightforward application of Supreme Court and Ninth Circuit caselaw on federal question jurisdiction. Section 1331(a) gives the district courts original jurisdiction of every civil action that "arises under the Constitution, the law, or treaties of the United States." A claim arises under federal law within § 1331 if it is apparent from the face of the complaint either that (1) a federal law creates the plaintiff's cause of action; or (2) if a state law creates the cause of action, a federal law that creates a cause of action is a necessary element of the plaintiff's claim. *See Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808-09 (1986).

Appendix

Federal land patents and acts of Congress do not provide bases for federal question jurisdiction. The Supreme Court has clearly stated that:

> [a] suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws.

Shulthis v. McDougal, 225 U.S. 561, 569-70 (1912). Furthermore, it is well established that "a controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress." *Id.* at 570.

Shulthis's rule that federal land patents do not confer federal question jurisdiction has been repeatedly reaffirmed by the Supreme Court, the Ninth Circuit, and other lower courts. *See, e.g.*, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 676-77 (1974) ("Once patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such

situations it is normally insufficient for 'arising under' jurisdiction merely to allege that ownership or possession is claimed under a United States patent."); *Barnett v. Kunkel*, 264 U.S. 16, 20 (1924) (same); *Landi v. Phelps*, 740 F.2d 710, 713-714 (9th Cir.1984) (holding that "the United States has no continuing interest in the property" acquired through federal land patents); *Standage Ventures, Inc. v. Arizona*, 499 F.2d 248, 249 (9th Cir.1974) ("The complaint does not allege expressly that any law of the United States is directly or indirectly involved in the dispute; it is not alone enough that appellant's title is traceable to such a law."); *Hilgeford v. Peoples Bank*, 776 F.2d 176, 178 (7th Cir.1985) (per curiam) ("It is well settled . . . that a controversy regarding land has never been regarded as presenting a federal question simply because one of the parties to it has derived his title from a patent or under an act of Congress.").

Despite this overwhelming caselaw, the appellants contend that two Supreme Court precedents, the acts of Congress conferring the patents, and the Supremacy Clause represent exceptions to the general rule. These claims lack merit.

A. Supreme Court Precedents: Oneida *and* Packer v. Bird

1. Oneida

First, the appellants argue that the holding in *Oneida* signifies an exception to the general rule. The exception, however, is extremely narrow. In *Oneida*, the Supreme Court determined that federal question jurisdiction existed because

"it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Oneida*, 414 U.S. at 677. The Ninth Circuit has interpreted this exception narrowly, recognizing an exception only if "federal law had a continuing interest in protecting the Indians' possessory right to tribal lands." *Landi*, 740 F.2d at 713.

This case does not involve a continuing federal interest in the possessory rights of Indian tribes. Therefore, the narrow exception that the Supreme Court carved out in *Oneida* is inapplicable here. As then-Justice Rehnquist pointed out in his *Oneida* concurrence, "federal courts have traditionally been inhospitable forums for plaintiffs asserting federal-question jurisdiction of possessory land claims. . . . [T]he grant of a land patent . . . carries with it no guarantee of continuing federal interest and certainly carries with it no indefinitely redeemable passport into federal court." *Oneida*, 414 U.S. at 683 (Rehnquist, J., concurring) (quoted in *Landi*, 740 F.2d at 713).

2. Packer v. Bird

The appellants argue that their indefinitely redeemable passport into federal court is federal common law created by *Packer v. Bird*, 137 U.S. 661 (1891). They claim this federal common law comes from one paragraph of dicta:

> The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.

Packer, 137 U.S. at 669 (emphasis added). The appellants emphasize that the last clause and the phrase "use and enjoyment" represent applicable federal common law worthy of federal question jurisdiction.

Packer, however, is a water rights case. Specifically, it involves whether a landowner's property extends to the high or low water mark of a stream. *See Packer*, 137 U.S. at 669-70. Most citations to *Packer* involve shoreline disputes. Though federal common law can provide the basis for federal question jurisdiction, *see, e.g., National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985), neither the Supreme Court nor the Ninth Circuit has ever invoked *Packer* to create federal common law conferring federal question jurisdiction.

Furthermore, five years after *Packer*, the Supreme Court rejected the appellants' argument and held that property received through federal land patents is subject to state and local regulations. *See Eldridge v. Trezevant*, 160 U.S. 452, 468 (1896) ("The subject-matter of such rights and regulations falls within the control of the states. . . .").

Finally, *Shulthis* established that an arising-under case must substantially involve a dispute respecting the construction or effect of a federal law and that land acquired through an act of Congress does not confer federal question jurisdiction. *See Shulthis*, 225 U.S. at 569-70.

B. Acts of Congress

In addition to relying on *Oneida* and *Packer*, the appellants contend that the acts of Congress conferring their federal land patents provide federal question jurisdiction. This argument is contrary to the express language in *Shulthis* that says acts of Congress do not confer federal question jurisdiction. *See Shulthis*, 225 U.S. at 570. Again, there is no Supreme Court or Ninth Circuit holding to the contrary.

C. The Supremacy Clause

Finally, the appellants argue that the Supremacy Clause, *see* U.S. Const. art. VI, cl. 2, provides an independent basis for federal question jurisdiction. The Supremacy Clause cases cited by the appellants are inapposite because they involve federal statutes or treaties that directly preempt state statutes. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (ERISA allegedly preempts New York Human Rights Law and Disability Benefits Law); *Fouke Co. v. Mandel*, 386 F.Supp. 1341 (D.Md.1974) (federal treaty and wildlife protection statute preempted Maryland criminal statutes prohibiting the importation of seal skins).

In this case, however, the appellants sought a lot line adjustment pursuant to County Ordinance and California

Government Code Section 66412(d). There is no analogous federal statute here that preempts either the county ordinance or state regulations. Furthermore, all the Supreme Court and Ninth Circuit cases on point hold that acts of Congress granting federal land patents are not bases for federal question jurisdiction. Nor is there any Supremacy Clause decision based solely on a federal land patent.

Since the *Oneida*, *Packer v. Bird*, and Supremacy Clause arguments are totally unpersuasive, we will not address the appellants' substantive claims. As the Ninth Circuit said in the federal land patent case most on point, "whatever the extent of [the Virgins'] possessory rights to that property, [they] must vindicate those rights in the state courts." *Landi*, 740 F.2d at 713-14.

The appropriate remedy for the appellants is to litigate their claims through the state court system and then file a petition for certiorari for the U.S. Supreme Court to review the state court decision with regard to these federal land patents. We affirm the district court's dismissal of this case for lack of subject matter jurisdiction.

AFFIRMED.

(3)

Supreme Court, U.S.
FILED
FEB 6 2001
OFFICE OF THE CLERK

No. 00-960

In the Supreme Court of the United States

EDWIN F. VIRGIN, SR., et al.,
Petitioners,

v.

COUNTY OF SAN LUIS OBISPO, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITIONERS' REPLY BRIEF

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ARGUMENT

I.

Artfully Dodging The Issue (Bullet) – State Court Efforts To Avoid Federal Property Rights Claims Through Creating The Impossible Standard of Review.

A. Introduction.

The County's thoughtful brief in opposition artfully, although unconvincingly, attempts to avoid the issue of how an impossible state court standard of review can thwart the ramifications of this Court's efforts to protect property rights. *First English Evan. Luth. Ch. v. Los Angeles County*, 107 S.Ct. 2378 (1987), *Nollan v. California Coastal Comm'n*, 483 U.S. 815, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), *City of Monterey v. Del Monte Dunes*, ___ U.S. ___, 119 S.Ct. 1624, 143 L.Ed. 882, 905 (1999), and *Village of Willowbrook v. Olech*, 120 S.Ct. 1073 (2000).

Beyond doubt, property owners in many jurisdictions are grateful for this Court's efforts to provide a modicum of protection which would not otherwise exist. Nonetheless, substantial judicial work remains to assure that property owners can enjoy those property rights secured by the Constitution and laws of the United States regardless of where their property is located.

The Virgins respectfully submit that a key to striking the proper balance between public needs and private rights can be advanced by addressing the standard of review of

federal constitutional claims which are joined with state administrative law remedies.

The central fallacy in the state appellate court's treatment of the Virgins' property rights is the assumption that federal constitutional property rights claims can be summarily resolved by applying a state administrative law standard of review which excludes consideration of the property owner's evidence, even if undisputed, and any inferences in favor of the property owner. No one would doubt that due process would be violated if federal constitutional claims were summarily dismissed by demurrer without assuming that the factual allegations are true, as in the *First English* case. Similarly, no one would doubt that due process would be violated if federal property rights claims are dismissed through summary judgment where the property owner has presented evidence of a triable issue of fact.[1] Instead, the state appellate court resolved all issues in the case by applying its own articulation of a standard of review which effectively makes it impossible to have a court consider evidence supporting the property owner's claims.

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[1] The state appellate court summarily dismissed the Virgins federal property rights claims not by applying the summary judgment standard of review pursuant to California Code of Civil Procedure § 437c(a). The governmental defendant has the burden of demonstrating that there are no material facts requiring trial on any of them. *Chevron U.S.A., Inc. v. Superior Court*, 4 Cal.App.4th 544, 548, 5 Cal.Rptr.2d 674 (Cal. 1992).

B. Neither The County, The State Appellate Court, Nor The Ninth Circuit Disputes That The Virgins Have Lost Valuable Property Rights Protected By The Fifth And Fourteenth Amendments.

Two critical factors are not disputed in the County brief in opposition, the state appellate court decision, or the Ninth Circuit Court of Appeal decision:

(1) The Virgins had separate and distinct legal parcels consisting of intact federal patents, and portions of patents legally divided by deeds; and

(2) That these separate legal parcels are fundamental incidents of ownership which constitute "property" for Fifth and Fourteenth amendment purposes.

There is no dispute regarding the Virgins' property rights which the state appellate court held to be extinguished because it is well settled under California law that a federal land patent creates a legal parcel. *Lakeview Meadows Ranch v. County of Santa Clara*, 27 Cal.App.4th 593, 598 (Cal. 1994).[2]

---

[2] The California Subdivision Map Act regulates the creation of legal parcels, but does not apply to legal lots created before the enactment of state statutes and local ordinances. California Government Code § 664210, *et seq.* Federal patents and portions thereof divided by deed are exempt from the provisions of the Map Act. *Id.*, § 66499.30(d). The Act expressly makes it illegal to sell, lease, or finance separate parcels without first complying with the Map Act. *Id.*, § 66499.30(a),(b),(c). Violation of the Map Act is punishable as a misdemeanor. *Id.*, § 66499.31. Any deed of property in violation of the Map Act is voidable [*Id.*, § 66499.32(a)], and subjects the owner to damages claims. *Id.*, § 66499.32(b). In this case, no further subdivision could be

The Virgins complain because fundamental incidents of ownership to convey, or bequest, legally separate portions of their property without the threat of criminal sanction and civil penalty have been summarily extinguished by expressly not reviewing any evidence against such extinguishment, even when that evidence was undisputed.

C. The Standard Of Review Applied By The State Appellate Court Negates And Circumvents Constitutional Remedies Required By This Court.

This Court struggled extensively with the constitutional "remedy issue" in *Agins v. City of Tiburon*, 100 S.Ct. 2138 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 101 S.Ct. 1287 (1981), and then resolved the issue in *First English, supra.*, holding that the invalidation of government action in lieu of damages is constitutionally inadequate. The "remedy issue," however, will never be completely resolved until the standard of review issue is also addressed. The standard of review applied by the state appellate court effectively evades the holding of *First English*, by creating an evidentiary bar to any remedy other than invalidation.[3]

For the property owner in California, no compensation remedy is available unless the administrative mandamus remedy under state law is first sought within short state law

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approved on the Virgins' properties since it would not comply with the minimum parcel sizes established by the County General Plan. Any new subdivision must be found to be consistent with the applicable General Plan standards. *Id.*, § 66473.5.

[3] The state appellate court disregarded any heightened standard of review.

created statutes of limitations. *Hensler v. City of Glendale*, 8 Cal.4th 1, 6, 876 P.2d 1043, 32 Cal.Rptr. 244 (Cal. 1994). Since federal courts will typically abstain from exercising jurisdiction over federal takings, civil rights, equal protection, and due process claims until the state court acts upon those claims, property owners such as the Virgins join their federal claims as a practical necessity with state created administrative law remedies.[4]

The state appellate court's decision in this matter illustrates how federal constitutional claims joined with state administrative law claims are summarily dismissed through the application of a state created administrative law standard of review. Thus, state courts can completely avoid the consideration of federal constitutional claims joined in state court actions by using a standard of review which completely defeats the property owners ability to prove their federal constitutional claims.

D. The County's Overstatement Of The Ninth Circuit Holding And Restatement Of The State Appellate Court's Standard Of Review Do Not Resolve These Issues.

The County brief in opposition attempts to avoid the ramifications of these issues by overstating the claims considered by the Ninth Circuit, and restating on different terms the express standard of review used by the state appellate court.

---

[4] See, for example, California Code of Civil Procedure § 1094.5, which requires that government action be sustained if it is supported by findings and the findings are supported by some substantial evidence. *Topanga Ass'n. for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 113 Cal.Rptr. 836 (Cal. 1974).

The Ninth Circuit did not have any federal takings, due process, equal protection, or civil rights claims pending before it. The case before the Ninth Circuit was a very narrow jurisdictional issue concerning whether or not federal courts have jurisdiction against state efforts to impair the efficacy of federal land patents. Certainly, the Ninth Circuit knew that these federal claims were pending in state court, and therefore, the Ninth Circuit opined that the Virgins' appropriate remedy was to pursue those claims through the state courts and then petition for writ of certiorari. *Virgin v. County of San Luis Obispo*, 201 F3d 1141, at 1145 (9th Cir., 2000).

The Ninth Circuit never pretended to resolve all federal law issues, contrary to the County's assertions, and for that reason suggested that after the litigation through the state courts had been resolved, the appropriate remedy was to petition for this writ. *Id.* Obviously, the Ninth Circuit would never have suggested petitioning this Court for certiorari if it had viewed all federal law claims as being completely resolved by its decision.

The County brief in opposition attempts to soften the state appellate court's express statement of the standard of review which it applied. The state appellate court in no uncertain terms stated its task:

> Our task on appeal is to determine whether the county's decision is supported by the findings and whether the findings made by the county are supported by substantial evidence. (Code Civ. Proc., § 1094.5, subds. (b)-(c).) Petition, Appendix B, p. 8a.

Thus, the state appellate court goes directly to the County's decision and applies a substantial evidence test necessarily treating the County as the "prevailing party" in its own administrative action, which the Virgins continue to view as draconian:

> The substantial evidence rule requires that we look only to the evidence supporting the prevailing party. (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.) We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. (*Ibid.*) Where the trier of fact has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable. (*Ibid.*) The trier of fact is not required to believe even uncontradicted evidence. (*Ibid.*) Petition, Appendix B, p. 8a.

That the state appellate court applied this standard of review is the only explanation for its failure to consider any evidence favorable to the property owners.

If this Court views the state appellate court's standard of review as ambiguous, then, as this Court has recently noted, it would be appropriate to remand the matter to the state appellate court.[5]

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[5] ". . . it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases." *Minnesota v.*

CONCLUSION

This case, therefore, is about the due process implications of dismissing federal constitutional claims based upon an extreme state law standard of review for a particular and limited state law remedy -- administrative mandamus -- which this Court in *First English* recognized as being an inadequate constitutional remedy. If the constitutional remedy of setting aside a local government's decision is constitutionally inadequate to resolve federal takings claims, then, most certainly, the state standard of review for a constitutionally incomplete remedy cannot be used to summarily dismiss federal constitutional claims.

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